



**CITY OF LODI  
COUNCIL COMMUNICATION**

**AGENDA TITLE:** Presentation and Request for Approval of Request for Proposals for Environmental Litigation

**MEETING DATE:** February 10, 2004

**PREPARED BY:** Deputy City Manager

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**RECOMMENDED ACTION:** That Mayor Hansen present to Council a Request for Proposals (RFP) for Environmental Litigation and that after discussion, Council approve the RFP.

**BACKGROUND INFORMATION:** Mayor Hansen has drafted a Request for Proposals (RFP) for environmental litigation for Council's approval. The purpose of the RFP is to solicit proposals from law firms to oversee the City's current environmental litigation. He will present the RFP, as a handout, during the Shirtsleeve Session and will further discuss the anticipated timeline for interviewing and hiring a firm.

**FUNDING:** Not Applicable

  
Janet S. Keeter  
Deputy City Manager

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**APPROVED:**   
H. Dixon Flynn, City Manager

**Requests For Information – Legal Services – 2<sup>nd</sup> Draft**

The City of Lodi has been involved in multi-party environmental insurance litigation for the past seven years at a cost of approximately 23 million dollars plus interests. In the 1996-97 budget year the city hired Michael Donovan of Zevnik, Horton, and Guibord as the lead attorney. Sometime in 1999 Mr. Donovan started Envision Law Group. In 1999 the City entered a financial agreement with Lehman Brothers and borrowed 16 million dollars with a variable interest rate averaging 25%. In November of 2003, the city hired the law firm of Barger and Wolen LLP to conduct a thorough audit of the billings from Envision Law firm and their sub-contractors. The lead attorneys working on the audit are Robert Levy and David McMahon. On January 6<sup>th</sup> the City Council fired Envision Law Group along with the City Attorney Randy Hays.

On January 6<sup>th</sup> the City council retained the law firm of Kronick, Moskovitz, Tiedemann and Girard to manage the environmental litigation and assist with city council business on an interim basis. Dan O'Hanlon and Robert Murphy from KMTG and Stephen Schwabauer, the interim city attorney, have been primarily responsible for seeking extensions, responding to motions, court orders and developing an interim strategy. The city of Lodi is now looking for a permanent legal team to develop strategies, mediate settlements, and encourage a rapid resolution to the litigation that fosters a rapid transition to beginning the actual environmental cleanup. To initiate this process, we anticipate inviting a number of law firms to meet individually with the city council to discuss ideas and solutions and then select a new legal team.

To assist you in preparing a response, we have enclosed a compact disk that contains court rulings, contracts, legal and technical expenditure spreadsheet, litigation calendar and miscellaneous briefs. Please note that the enclosed information should be considered confidential and should not be used for any purpose other than providing information to us regarding your services. Please submit a written response to the City Of Lodi no later than 5:00pm February 24, 2004.

**Background**

In April 1989 Lodi first detected Tetrachloroethene ("PCE") in a water sample from a new water tank. Subsequent testing found PCE contamination in the groundwater and several Lodi water wells. In March of 1992 the Central Valley Regional Water Quality Control Board (RWQCB") issued a report identifying a cleaning business as one of the potential sources of PCE-contaminated wastewater discharge into Lodi's sewer lines and suspected as a source of the soil and groundwater contamination. In 1993 the California State Department of Toxic Substance Control ("DTSC") commenced an investigation of the contamination. In 1994, DTSC initiated an administrative action against selected potentially responsible parties, including Lodi, to address the soil and groundwater contamination.

In May of 1997 Lodi's City Council authorized the City Manager to execute a "Comprehensive Joint Cooperative Agreement" with DTSC concerning the investigation and abatement of hazardous substance contamination within the city. Michael Donovan of Envision Law Group presented this agreement to the City Council.

Since the discovery of the contamination, Lodi has faced the issue of potential liability. The city exposure to liability was due to alleged leaks from its sewer system and the alleged direct discharge of PCE by city employees. Despite the issue of potential liability the Agreement specifically designated Lodi the "Lead enforcement entity," in place of DTSC, and obligated Lodi to "cause a prompt, comprehensive, and cost-effective investigation and remediation" of the ground and soil contamination. See Fireman's Fund, 302 F.3d at 935.

In August of 1997 the city council, at Mr. Donovan's direction, enacted the Comprehensive Municipal Environmental Response Ordinance (MERLO"), which sets forth a remedial liability scheme partially modeled on CERCLA. MERLO provides Lodi with municipal authority to investigate and remediate existing or threatened environmental nuisances affecting the City and to hold responsible parties or their insurers liable for the cost of Lodi's nuisance abatement activities. The City Council authorized litigation against the responsible businesses to gain access to their insurance coverage to pay for soil and groundwater clean up. The litigation includes numerous actions at various levels of state and federal court. A summary of those proceedings provided by Mr. Donovan is attached though its accuracy can not now be warranted by the Council or its interim legal team.

The City's insurer, USF & G is providing defense costs for the City of Lodi since Lodi's designation as a potentially responsible party (PRP). However, some amount of the USF&G legal reimbursements are being paid to Lehman Brothers under arrangements made by the City's prior counsel.

The City has participated in numerous mediation and settlement hearings with court appointed mediator Lester J. Levy, Esq. with JAMS in San Francisco.

In 2003 Judge Frank C. Damrell of the United States District Court made the following statements in the case of Fireman's Fund Insurance Company, (Plaintiff) v. City Of Lodi, California (Defendants). Judge Damrell stated that MERLO'S cost recovery scheme generates the opportunity for a financial windfall for Envision and Lehman Brothers, Inc. an investment Bank which has no interest in cleaning up the contaminated site. The judge stated that this profit-seeking concept of cost recovery is contrary to CERCLA and is in direct violation of the goals and objectives set by Congress. He ruled that MERLO elevates the financial interests of Lodi, its attorneys, and others, above the priorities of environmental cleanup and the prompt resolution of disputes. Based upon the court's findings of preemption, the court made the following orders:

1. Lodi and its officers are enjoined from enforcing or invoking MERLO against any person who is a PRP at the site of contamination;

2. Lodi and its officers are enjoined from enforcing or invoking MERLO'S provision for joint and several liability against any person who is a PRP at the site of contamination;
3. Lodi and its officers are enjoined from enforcing or invoking MERLO to collect attorney's fees against any person who is a PRP at the site of contamination;
4. Lodi and its officers are enjoined from enforcing or invoking MERLO to collect "action abatement costs" against any person who is a PRP at the site of the contamination.

Based on the above, plaintiff Fireman's Fund's motion for partial summary judgment was "GRANTED" and a permanent injunction is issued against defendant City of Lodi in accordance with the above orders.

On January 12<sup>th</sup> 2004, the eve of phase one of a trial, Judge Damrell made some rulings and observations. The judge noted, "After a series of motions and appeals, this case has devolved into an environmental clean up action in which Lodi claimed to be a co-plaintiff with the City." The trial would address Lodi Section 107 (b) defense wherein Lodi had the burden of proving by a preponderance of evidence that it's entitled to a Section 107(b) defense as a potentially responsible party within the meaning of CERCLA section 107(a). In response to Mr. Donovan's move to vacate the upcoming trial the judge suggested that the city consider vacating our litigation strategy. Refer to the Federal Court brief dated January 12, 2004. Also please refer to Federal Court brief dated January 14, 2004 in which Judge Damrell granted the city a 30-day continuance to assess the impact of vacating our legal defense strategy. The judge also issued some strong concerns regarding the legality of the Lehman Brothers financing agreement with the City, and required all parties to file a status report by February 12, 2004.

### **Questionnaire**

Please provide written responses to the following questions, as well as a firm brochure and other materials describing your firm or the professional background of attorneys from your firm that you believe would be helpful.

1. What strategy would you propose to effectively gain access to insurance coverage of responsible parties?
2. What strategy would you propose to effectively minimize the City's liability and contribution as a potentially responsible party?
3. What strategy would you propose to minimize ongoing litigation and move the City into the contribution and settlement phase?

4. Describe your experience in complex, multi-party environmental insurance litigation.
5. Provide an outline of your background in working with a mediator in settlement hearings.
6. Describe your trial experience in Federal court.
7. Describe your experience in working with public entities and municipal law.
8. Describe your firm's technological capabilities for case management, billing and status reports?
9. Describe your successful experience dealing with soil and groundwater contamination litigation and clean-up?
10. Describe your firm's practice for billing and progress reports to your clients.
11. Indicate potential conflicts your firm may have with this litigation and your suggestion for overcoming them.
12. Describe your firm's successful experience filing suit against other law firms for malpractice and recovery of "unreasonable and unnecessary" fees.
13. What experience, if any, have you had in the United States District Court for the Eastern District of California, Sacramento Division and particularly with Judge Frank C. Damrell?
14. How would you describe your litigation style?
15. How would you describe your mediation and settlement style?
16. What is your anticipated litigation/mediation budget and timeline?